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H. LaDon Baltimore

May 6, 2005

Honorable Pat Miller, Chairman
Tennessee Regulatory Authority
ATTN: Sharla Dillon, Dockets
460 James Robertson Parkway
Nashville, TN 37243-5015

Via Hand Delivery

Re: Petition of Citizens Telecommunications Company of Tennessee, LLC d/b/a
Frontier Communications of Tennessee; Docket No. 03-00211

Dear Sharla

Enclosed for filing in the above-referenced matter, please find the original and 13 copies of the Initial Brief of Ben Lomand Communications, Inc. **Please date stamp the extra copy and return it to the courier making this delivery.** Thank you for your assistance.

Sincerely,

H. LaDon Baltimore
H. LaDon Baltimore

LDB/dcg
Enclosures
cc: Guilford Thornton, Esq.

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:)	
)	
CITIZENS TELECOMMUNICATIONS)	
COMPANY OF TENNESSEE, LLC,)	DOCKET NO. 03-00211
d/b/a FRONTIER COMMUNICATIONS)	
OF TENNESSEE,)	
)	
Petitioner.)	

INITIAL BRIEF OF BEN LOMAND COMMUNICATIONS, INC.

Ben Lomand Communications, Inc. ("Ben Lomand"), by and through its undersigned counsel and in accordance with the procedure set forth in the Hearing Officer's Order of April 13, 2005, respectfully files this brief and would show unto the Tennessee Regulatory Authority ("TRA" or "Authority") as follows:

I. INTRODUCTION

On March 19, 2003, Citizens Telecommunications Company of Tennessee, LLC d/b/a Frontier Communications of Tennessee ("Citizens") filed a petition seeking to exempt its rates for tariffed services offered in McMinnville and Sparta, Tennessee from the price floor set forth in Tenn. Code Ann. §65-5-108(c).¹ On April 10, 2003, Ben Lomand filed its Petition to Intervene and/or Response and Motion to Dismiss. During a regularly scheduled Authority Conference on July 7, 2003, the voting panel assigned to this docket voted to hold this procedure in abeyance pending the resolution of TRA Docket No 02-01221. When the complaint in that docket was withdrawn, such docket was closed. On September 15, 2004, Citizens filed the

¹ At the time the petition was filed, the statute was codified as Tenn Code Ann §65-5-208(c)

Petitioner's Motion to Revive Docket, Appoint Hearing Officer, and Schedule a Status Conference in This Docket. During the September 27, 2004 Authority Conference, the panel voted to reactivate the docket and convene a contested case. At a status conference held March 24, 2005, the parties agreed to waive cross-examination of witnesses and proceed in this docket with the filing of briefs and the presentation of oral argument. The pre-filed testimony and the discovery would be made a part of the record.

II. ARGUMENT

Citizens attempts by its petition to be able to charge prices below its cost. Approval of the petition would unleash the extensive coffers of Citizens and would allow unfair competition in the Sparta and McMinnville markets. Citizens is one of the largest telecommunications companies in the nation and would have unlimited resources to compete with its much smaller competitor, Ben Lomand. If Citizens is allowed to price its rates below cost, then it will have to subsidize those rates. Subsidization could come from other Citizens divisions within the State of Tennessee or from other services within the Sparta and McMinnville markets. Citizens has made no case that the public interest would be benefitted as required by the statute. The only argument Citizens makes is that exemption would relieve it from the costs incurred in making a cost study filing with the TRA.

Due to the enormous public policy implications of Citizens's petition, policy and guidelines need to be established for the granting of exemption from the price floor requirement; such exemptions should not be granted on a case-by-case basis. The Authority needs to open a generic docket for a rulemaking procedure to determine the criteria for exemption from the price floor requirement.

A. Citizens has failed to prove that relief from the price floor is in the public interest.

1.a. Citizens states why relief from a price floor is good for Citizens, but does not establish why it is in the public interest as required by Tenn. Code Ann. §65-5-108(c).

Citizens bases the majority of its case for exemption from the price floor on the fact that it faces stiff competition from Ben Lomand. (Citizens's Petition, page 2, no. 6; par. 8, par. 12, see also, Testimony of J. Michael Swatts, page 12-13). The fact that Citizens has lost business to Ben Lomand is not a ground for the TRA to grant it exemption from the price floor. The requirement for exemption from the price floor is that it is "in the public interest," not because a competitor loses business. If this were the case, every time a telecommunications service provider loses business, it would request exemption from the price floor.

Citizens omits any reason for its loss of customers other than the fact that it operates under the price floor requirement. Frontier completely omits the fact that Ben Lomand is beating Frontier in the marketplace with service, product offerings, and occasionally price. The price floor is not the only reason Citizens is losing customers as it implies. Ben Lomand's prices are sometimes equal to, sometimes below, and sometimes above those of Citizens. (See Rebuttal Testimony of Levoy Knowles, page 7).

Citizens has already reduced its price from 42% to 74% (See Rebuttal Testimony of Levoy Knowles, page 5), and it admits it is still losing customers. Therefore, it is evident that it is not price but service and other factors that are causing Citizens's loss of customers.

1.b. Citizens has agreed competition alone does not meet the public interest in an analogous matter before the FCC.

In a matter before the Federal Communications Commission ("FCC") regarding designating additional ETCs, Citizens argues that mere competition does not satisfy the public interest test. See Exhibit 1, page 2, II.A. In this present case before the TRA, Citizens's argument that competition permits it to price below the price floor nullifies the public interest in Tenn. Code Ann. §65-5-108(c) since it results in the conclusion that competition always meets the public interest test. The Tennessee General Assembly could have made the test in Tenn. Code Ann. §65-5-108(c) competition, but it did not. The General Assembly made "in the public interest" the test, which is much broader.

2. The fact that Citizens must file a cost study with the TRA is not grounds for exemption from the price floor.

Citizens repeatedly states that it should be exempt from the price floor because it is incurring expense in preparing a cost study to file with the TRA (See Testimony of J. Michael Swatts, page 7; Testimony of Randall J. Brockman, pages 4-6). The fact that Citizens must file a cost study with the TRA is not contemplated by the statute to allow for exemption from the price floor. It appears that Citizens is more interested in lowering its costs and eliminating an expensive and time-consuming process than it is in competition, lower prices, and better services for consumers.

3. Allowing Citizens to price below the price floor will allow not only below cost pricing, but allow Citizens to engage in other anti-competitive practices in violation of Tenn. Code Ann. §65-4-123 and 65-5-108(c).

Granting exemption from the price floor will violate Tenn. Code Ann. §65-4-133 which states that "the regulation of telecommunications services and telecommunications service

providers shall protect the interest of consumers without unreasonable prejudice or disadvantage to any telecommunications service provider." Tenn. Code Ann. §65-5-108(c) prohibits anti-competitive practices such as "cross-subsidization, preferences to competitive services or affiliated entities, predatory pricing, price squeezing, price discrimination, tying arrangements, or other anti-competitive practices."

As stated in the Rebuttal Testimony of Levoy Knowles at pages 3-5, it is apparent that if Citizens prices its services below cost, someone has to subsidize the operation. The Testimony of J. Michael Swatts states that Citizens will make up the shortfall by selling more vertical services above cost (See Testimony of J. Michael Swatts, page 11). However, as stated in Mr. Knowles's testimony, page 4 with exhibit, Citizens is also discounting other features as well as the local rates. If not only local rates are priced below the price floor and vertical services are also being discounted, it would lead to the conclusion that the shortfall would have to be made up from other Tennessee consumers. Citizens, in its pleadings, testimony, and other filings, states that it will not cross-subsidize nor engage in predatory pricing, but no guarantees are set forth

Citizens is already the low-cost provider, even before being given permission to go below the price floor. Subsidization of Citizens's services could drive Ben Lomand out of the market, thus leaving consumers with only one choice for telecommunications services. With low prices and less revenue, whether subsidization or no subsidization is involved, it is inevitable that service, investment, capital improvements, etc. will suffer, which in turn will lower service and harm the consumer. It is highly unlikely that there would be enough margins in such prices to offer the service the consumer needs and expects. THEREFORE, THE PUBLIC INTEREST WILL BE HARMED, NOT FURTHERED.

B. Citizens's current rates violate Tenn. Code Ann. §65-5-101(a) and §65-5-108(c).

It appears that Citizens's present rates violate Tenn. Code Ann. §65-5-101(a), which requires "just and reasonable individual rates" and §65-5-108(c), which requires an ILEC to adhere to a price floor.

In one case, Citizens is already pricing below its costs by reducing charges by more than 75%. Typical reductions range from 42% to 66% off the normal tariff rates. (See Rebuttal Testimony of Levoy Knowles, page 3). This raises two questions: (1) If Citizens is reducing its rates from a tariff rate of \$31.25 to \$8.00 (74%), how can it still be above the price floor? and (2) If \$8.00 is still above cost, then its normal tariff rate of \$31.25 is not a "just and reasonable individual rate."

C. A rulemaking proceeding is necessary before the Authority should exempt a service or group of services from the requirement of the price floor.

The Uniform Administrative Procedures Act requires rules to be adopted in this matter. Tenn. Code Ann. §4-5-102 states, "'Rule' means each agency's statement of general applicability that implements or prescribes law or policy or describes the procedures or practice requirements of any agency." The criteria for exemption from the price floor and resulting procedures, filings, practices, etc. falls under the definition of "rule" in that such exemption and resulting procedures are statements of general applicability that implements or prescribes law or policy or describes the procedures or practice requirements of any agency.

The price floor exemption states, "[t]he authority shall, as appropriate, also **adopt other rules** or issue orders to prevent cross-subsidization, . . . [etc. .]" Tenn. Code Ann. §65-5-101(c) (emphasis added). When read with the sentence just quoted, the next sentence "[w]hen shown

to be in the public interest, the authority shall exempt a service or group of services provided by an incumbent local exchange telephone company from the requirements of the price floor," should be read to require the adoption of rules regarding such exemption. In other words, reference to "**adopt other rules**" should be read to mean that the preceding sentence also contemplates adoption of rules to determine exemption. Otherwise, there is no need to state that the Authority should "also adopt **other** rules." (emphasis added)

Citizens's petition is one of first impression at the TRA. Exempting an incumbent local exchange company ("ILEC") from the requirements of a price floor is more far reaching than this one docket. A rulemaking proceeding would determine what factors and guidelines are necessary before relief is granted from the requirement of a price floor. If this petition is granted and petitioner is relieved from a price floor, other ILECs will be in line to request such relief.

The issues involved in this matter are of such major import that they should not be decided on a case-by-case basis, but as the result of a careful, thought out procedure under guidelines, rules and regulations adopted by the TRA. Other factors are involved when relief from a price floor is requested. The interplay of such issues as cross-subsidization, predatory pricing, price squeezing, price discrimination, tying arrangements, or other anti-competitive practices necessitate a rulemaking proceeding. Without such rules, any ILEC facing competition will request the TRA to relieve it of the requirements for a price floor.

The adoption of rules setting forth what other rules and policies to be filed in the event a price floor exemption is granted should be adopted. Citizens states in paragraph 13 of its petition that it "agrees to continue to file tariffs and other materials as required by law." Therefore, Citizens is stating that once a price exemption is granted, it will then decide which laws it agrees

to follow and which it does not agree to follow. Granting Citizens's petition would, in effect, deregulate Citizens from the Authority. No rules have been adopted to state what other regulations, rules, and statutes Citizens should follow if it is exempted from the price floor requirement.

A rulemaking proceeding would allow other ILECs and competitive local exchange carriers ("CLECs") to engage in the discussion and adoption of rules regarding exemption from price floors. Exemption of Citizens from a price floor requirement affects more than the parties to this docket. It affects every telecommunications service provider in the State of Tennessee. Therefore, input into the adoption of rules and regulations affecting all such telecommunications service providers is necessary.

III. CONCLUSION

To summarize, Citizens's position in this matter is that since it cannot compete on the basis of price and service, it wants to compete unfairly through below cost pricing and other anti-competitive practices. Granting Citizens's petition would not serve the public interest; it would only serve Citizens's interests.

For the foregoing reasons, the Authority should deny Citizens's petition in its entirety

Respectfully submitted,

A handwritten signature in black ink, appearing to read "H. LaDon Baltimore", is written over a horizontal line.

H. LaDon Baltimore, BPR #003836

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Certificate of Service

The undersigned hereby certifies that on this the 6th day of May, 2005, a true and correct copy of the foregoing has been forwarded via first class U S. Mail, hand delivery, overnight delivery, electronic transmission, or facsimile transmission to the following

Guilford F. Thoronton, Jr., Esq.
Stokes, Bartholomew, Evans & Petree
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H LaDon Baltimore

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on)	
Universal Service)	
)	
Advantage Cellular Systems, Inc.)	CC Docket No. 96-45
)	
Applications for Designation as an Eligible)	
Telecommunications Carrier in the State of)	
Tennessee)	

**JOINT REPLY COMMENTS OF THE TENNESSEE INDEPENDENT TELEPHONE
COMPANIES**

Concord Telephone Exchange, Inc., Crockett Telephone Company, Humphreys County Telephone Company, Loretto Telephone Company, North Central Telephone Cooperative, Inc., Peoples Telephone Company, Tellico Telephone Company, Inc., Tennessee Telephone Company, and West Tennessee Telephone Company (together, the "Independents") respectfully submit these joint reply comments regarding the Petition of Advantage Cellular Systems, Inc. to be Designated as an Eligible Telecommunications Carrier ("Petition") in its commercial mobile radio service ("CMRS") license area in Tennessee. Each of the Independents is a Rural Telephone Company, as that term is defined in 47 U.S.C. § 153(37), and provides service in Tennessee.

This matter is before the Commission because the Tennessee Regulatory Authority has determined that it lacks jurisdiction to designate Advantage, a CMRS carrier, as an eligible telecommunications carrier ("ETC") in Tennessee.



I. Introduction

Advantage has filed a petition to be designated as an ETC in its cellular license area in Tennessee, which includes portions of study areas served by BellSouth and a number of Rural Telephone Companies ("RTCs"). The affected RTCs are Ben Lomand Rural Telephone Cooperative, Inc., Bledsoe Telephone Cooperative, Inc., DeKalb Telephone Cooperative, Inc. (with which Advantage is affiliated), Citizens Telecommunications Company of Tennessee d/b/a/ Frontier Communications of Tennessee, North Central Telephone Cooperative, Inc., and Twin Lakes Telephone Cooperative. Frontier submitted initial comments.

Because Advantage seeks to be designated as an ETC in portions of these RTCs' study areas, it must demonstrate that it meets the minimum criteria of Section 214(e)(1) and that designating it as an ETC in the RTCs' study areas "is in the public interest."¹ Further, Advantage must demonstrate that it meets the requirements to have its designated service area redefined from the entirety of the RTCs' study areas to just the portions in which it is a commercial mobile radio service ("CMRS") licensee. Generally, Advantage is required to serve the entirety of every RTC's study area in which it is designated as an ETC.

II. Designation Of Advantage As An ETC In Frontier's Study Area Is Not In The Public Interest

The Independents agree with Frontier that designating Advantage as an ETC in the RTCs' study areas is not in the public interest.

A. Advantage's Public Interest Argument Conflicts With Section 214(e)(2)

Frontier correctly points out that Advantage offers the same flawed argument as many other CMRS ETC applicants with respect to the public interest issue. Reduced to its most basic elements, the argument is that designating additional ETCs in an RTC's study area creates

¹ 47 U.S.C. § 214(e)(2).

competition, competition is in the public interest, therefore designating Advantage as an additional ETC in the RTCs' study areas is in the public interest.

If accepted, this argument nullifies the public interest test contained in Section 214(e)(2) because it results in the conclusion that designating additional ETCs in RTCs' study areas is always in the public interest. If increasing competition were enough to satisfy the public interest test, Congress never would have limited the designation of additional ETCs in RTCs' study areas to those instances when such designation is in the public interest. Instead, it could have applied the same standard to both rural and non-rural areas.

Congress, however, by adopting the public interest test and delegating to states the discretion to determine whether and how many ETCs to designate in RTCs' study areas, recognized that it does not always make sense to designate additional ETCs in such areas. Therefore, the Commission should not accept Advantage's blanket public interest argument.

B. Designating Advantage As An ETC Will Not Increase Competition

Advantage has been providing CMRS within its licensed service area for years, and the RTCs' customers within Advantage's license area already have access to Advantage's or other CMRS carriers' services. Advantage obviously is not a new entrant and giving it USF will not somehow transform its service into a new, competing service. Therefore, the benefits, whatever they may be, that flow from competitive entry will not result from designating Advantage as an ETC. Consumers will not experience the host of benefits that Advantage claims will result from designating it as an ETC in the RTCs' study areas.

C. Designating Advantage As An ETC Will Result In Cream Skimming Or Similar Harms

Frontier correctly points out that designating Advantage as an ETC in the RTCs' study areas will result in cream skimming. Cream skimming generally refers to the problem of an additional ETC serving low cost areas while receiving USF that is based on averaged costs to serve the entire study area. The harm in this, of course, is that the ETC receives too much USF relative to the costs to serve the low cost area where it provides service without incurring the additional expense of also serving the high cost areas. Generally, disaggregating USF solves this by apportioning USF among cost zones so that the amount of USF that flows to each cost zone reflects the costs to serve that zone.

Disaggregation does indeed solve the cream skimming problem as long as the billing address and the service address are the same, which is hardly ever the case with mobile service. Customers rarely use their mobile phones at home, which is likely to be the billing address. To the extent that Advantage customers who live in high cost areas primarily use their phones in low cost areas, which is most often the case in RTCs' study areas, Advantage will receive too much USF relative to the costs to provide service in the area where the service is actually provided. USF can even be exported out of the intended study area if Advantage's customer uses her mobile phone in a study area that is different from the one where she lives.

Whether this is called cream skimming, arbitrage, gaming, or something else, it is not in the public interest to allow it to occur. USF is aimed at defraying the costs of maintaining a network to make service universally available within a study area; it should not be redirected to any other purpose.

III. Advantage Should Not Be Designated As An ETC For Less Than The Entirety of Each of The RTCs' Study Areas

The Independents concur with Frontier's comments regarding whether Advantage should be designated as an ETC for less than the entirety of each of the RTCs' study areas – it should not be so designated. Section 214(e)(5) requires Advantage to serve the entirety of any RTC's study area for which it is designated as an ETC, and the prerequisites for removing this obligation from Advantage have not been met. The only clear statement from the Joint Board is that this obligation should not be removed.

There is nothing in Section 214(e)(5) to suggest that this requirement does not apply to ETC applicants that are CMRS carriers. Yet, excusing all CMRS ETCs from the obligation to serve an RTC's entire study area is to nullify the requirement.² This requirement can no more be ignored or nullified than can the public interest test.

A CLEC claiming that it cannot serve an RTC's entire study area because it lacks a CMRS license for that area likely would be unsuccessful in trying to avoid the obligation to serve the entire study area. The absurdity of such a contention is obvious, even though the limited availability of licenses make it improbable that the CLEC could use CMRS technology to provide service. Why then, should a CMRS carrier that seeks the same ETC designation and the same USF money be successful in arguing that because it has a CMRS license, it cannot serve the entire study area? The concept of technological neutrality demands that all ETCs be held to the same standards and requirements regardless of the technology they use.

² This is the effect of accepting the argument that a CMRS ETC cannot provide service outside of its license area. That argument is true only to the extent that a CMRS ETC cannot provide service using CMRS technology. Because such an ETC is free to use other technology, the lack of ability to use CMRS technology provides no basis for relieving an ETC of its statutory obligation to serve an entire study area.

For these reasons and for the reasons discussed in Frontier's comments, Advantage should not be designated as an ETC for less than the entirety of the RTCs' study areas

IV. Proposed Rule Changes Could Alter The Outcome Of This Proceeding

Frontier makes an excellent point that proposed changes to the USF mechanism and the qualifications for being an ETC could result in Advantage no longer meeting the Section 214(e)(1) minimum criteria for being an ETC and other changes could affect whether designating Advantage as an ETC is in the public interest. For example, equal access may become a supported service, which would mean that Advantage no longer qualifies as an ETC.

Of greatest concern to the Independents, however, are proposals that would reduce the amount of USF that they receive when additional ETCs are designated in their study areas. Such changes, especially in conjunction with the loss of access revenues that the Independents are already experiencing as a result of customers using their mobile phones for toll calls, could be disastrous to the continued provision of universal service in rural areas. If RTCs lose USF when additional ETCs are designated in their study areas, RTCs could find themselves losing USF while still being required to maintain a network to serve all potential customers.

CMRS carriers present a particularly significant problem in this regard because customers generally have both a wireline and a wireless phone. While USF is aimed at defraying the costs of the network, the costs of which do not change when the USF associated with a customer is ported to another ETC, an RTC could even find itself being required to serve customers for which they no longer receive USF. Additionally, to the extent that the Commission routinely designates CMRS ETCs to serve less than an RTC's entire study area, a situation could arise in which it is no longer economically viable for the RTC to continue

providing service, yet there will be no other ETC required to or prepared to serve the most rural, high cost areas.

The Independents therefore agree with Frontier that any designation of Advantage as an ETC should be based on the current rules and the Commission should expressly state that the designation is not a determination of whether Advantage should be an ETC under any modified rules.

V. SUMMARY

The Independent's agree that designating Advantage as an ETC in the RTCs' study areas is not in the public interest, that such designation will not bring to consumers the benefits of new competitive entry, that Advantage's public interest argument should be rejected, and that, if Advantage is designated as an ETC, it must be designated to serve the entirety of each of the RTCs' study areas. The Independents also agree that any designation of Advantage as an ETC in the RTCs' study areas should be expressly limited to the rules that currently exist and should be effective only as long as the rules remain unchanged

Respectfully Submitted,

Desda Hutchins
Loretto Telephone Co.

Thomas Rowland
North Central Telephone Coop , Inc.

Bruce Mottern
Concord Telephone Exchange, Inc.
Humphreys County Telephone Co.
Tellico Telephone Co
Tennessee Telephone Co.

Lera Roark
Crockett Telephone Co.
Peoples Telephone Co.
West Tennessee Telephone Co.

July 3, 2003